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No. 130.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930.

DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AND THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONERS,

AGAINST

BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY MISSOURI, AT KANSAS CITY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI AND BRIEF IN SUPPORT THEREOF.

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CYRUS CRANE,

Counsel for Petitioner, The Atchison, Topeka and Santa Fe Railway Company.

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BEN TERTE, JUDGE OF THE CIRCUIT COURT OF JACKSON COUNTY MISSOURI, AT KANSAS CITY, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSOURI.

Petitioners, Denver and Rio Grande Western Railroad Company and The Atchison, Topeka and Santa Fe Railway Company, respectfully pray for a writ of certiorari to the Supreme Court of the State of Missouri to review a judgment of that Court entered March 3rd, 1931.

The transcript of the record in the case, including the proceedings in the Supreme Court of Missouri, has been filed herewith in accordance with Rule 38 of this Court.

Statement of the Case.

On or about the 21st day of August, 1930, Ray Curtis filed in the Circuit Court of Jackson County, Missouri, his petition (R. 5-10) together with an affidavit in attachment (R. 11) wherein he claimed damages against your petitioners herein jointly, in the sum of $75,000.00 on account of injuries alleged to have been received by him on or about the 26th day of December, 1929, at Pueblo, Colorado, while he was an employee of the Denver and Rio Grande Western Railroad Company in the capacity of assistant signal maintainer or helper at, and while repairing, its interlocking tower at Pueblo, Colorado (R. 22, affidavit of Pyeatt).

Upon the filing of said petition and affidavit, a writ of attachment against said Denver and Rio Grande Western Railroad Company and a summons (R. 12) to both defendants was duly issued under the hand and seal of the Clerk of the Circuit Court of Jackson County, Missouri, at Kansas City, directed and delivered to the Sheriff of Jackson County, and thereafter said sheriff served upon The Atchison, Topeka and Santa Fe Railway Company a summons and writ of attachment and a copy of the petition, pursuant to the statutes, through E. W. Jette (R. 13) described in his return as chief clerk of said defendant corporation, and said sheriff also served a copy of the summons

and attachment writ upon said Denver and Rio Grande Western Railroad Company, through H. F. Kleine (R. 13) described in his return as general agent of said defendant corporation.

The Denver and Rio Grande Western Railroad Company, appearing only for the purpose of its motion (R. 17) moved to quash the original writ and the return of service thereof and to dismiss the action for want of jurisdiction, and in its motion stated, among other things, that the railroad company was incorporated under the laws of the State of Delaware for the purpose of operating a railroad; that its main office was in Denver, Colorado; that it owned and operated lines of railroad in the states of Colorado, Utah and New Mexico; that it had never been licensed to do business in Missouri and had never consented to be sued in said state; that it had never done any business in Missouri except that it maintained an office in Kansas City, Missouri, which at the time of the service of the summons and attachment writ was in charge of H. F. Kleine, upon whom service of said summons and attachment writ was had; that H. F. Kleine was a soliciting agent for the Denver and Rio Grande Western Railroad Company under the title of "agent," and his only business was to solicit freight and passengers for transportation over the lines of said railway company in interstate commerce outside of the State of Missouri; that said Kleine did not sell tickets nor did he receive any payment for the transportation of freight; that he issued no bills of lading covering any shipments of freight from the State of Missouri

over the lines of said railway company; that he did not pay out any money for said railroad company; that he had no authority to make contracts, nor did he make any contracts for said railroad company and that his sole duty was to solicit freight and passenger business as above stated. Said motion also challenged the jurisdiction of the Court on the ground especially that the action would be an unreasonable burden on interstate commerce, in that all the witnesses to the facts and circumstances in connection with the alleged accident reside outside of the State of Missouri and without the jurisdiction of the Circuit Courts of Missouri, their residence being in the State of Colorado, where the alleged accident occurred and where defendant could be served with process.

The Atchison, Topeka and Santa Fe Railway Company, appearing only for the purpose of its motion (R. 25) moved to quash the return of service of process upon it, and in its motion stated, among other grounds, that it was incorporated under the laws of Kansas; that the controversy upon which the pretended cause of action set forth in plaintiff's petition purports to be based and on which the service of process upon it was based arose in Colorado while plaintiff was an employee of the Denver and Rio Grande Western Railroad Company engaged in the service of said railroad company, and that all of the witnesses to the facts and circumstances involved in the suit, necessary to establish the defense of The Atchison, Topeka and Santa Fe Railway Company, were employes of the Denver and Rio Grande Western Railroad Company and reside

outside of the State of Missouri and without the jurisdiction of the Circuit Court of Jackson County, Missouri, and reside in the State of Colorado when service of process could be had on both defendants.

After a hearing upon your petitioners' motions to quash the returns of service in the State Circuit Court, those motions were separately denied by that Court (R. 33).

Whereupon, your petitioners, availing themselves of the right to a writ of prohibition given them by the Constitution and statutes of Missouri, filed in the Supreme Court of Missouri their petition for a writ of prohibition (R. 3) directed to the Hon. Ben Terte, Judge of the Circuit Court of Jackson County, Missouri, in which they set forth in detail all of the foregoing facts, including therein a copy of the petition (R. 5) filed by Ray Curtis against your petitioners, copies of the returns of service made by the sheriff of Jackson County, Missouri, at Kansas City (R. 13) and a copy of the motions to quash these returns (R. 17-20, 25-28) and a copy of the rulings thereon (R. 33).

In the petition so filed in the Supreme Court of Missouri your petitioners invoked the rights given them by Section 8 of Article I of the Constitution of the United States, the Commerce Clause (R. 20) and also of Section 1 of Article XIV of the Amendments to the Constitution of the United States (R. 20) the due process clause.

In said petition your petitioners asserted that if the laws of Missouri should be so construed as to con-

fer jurisdiction on the Circuit Court of Jackson County, Missouri, over your petitioners and over the cause of action asserted against them, such laws were, to that extent, void because in conflict with the constitutional provisions above mentioned (R. 40).

The petition thus presented to the Supreme Court of Missouri was verified and was accompanied by suggestions (R. 43) in which were set out the rulings of this Court in the cases referred to in our brief filed herewith, and in other cases.

The petition for a writ of prohibition was filed on the 3rd day of February, 1931 (R. 1) and on March 3, 1931 (R. 88) the Supreme Court of Missouri entered final judgment, without filing written opinion, denying the petition for a writ of prohibition (Ragland, Chief Justice, and Atwood, J., dissenting).

Questions Presented.

Under this record the following important questions are presented:

1. Is it not an undue and unreasonable burden upon interstate commerce, under repeated decisions of this Court, to permit a state court in Missouri to take jurisdiction and hear and determine a suit brought by Curtis as plaintiff, under the Federal Employers' Liability Act, for personal injuries alleged to be due to negligence, against his employer, the Denver and Rio Grande Western Railroad Company (petitioner), which alleged injuries were received at the place of plaintiff's residence in the State of Colorado (although he acquired a residence in Missouri before the bringing

of this suit); when it is made to appear that the Denver and Rio Grande Western Railroad Company was and still is a corporation organized under the laws of Delaware, licensed to do business in Colorado, but not in Missouri, and having no tracks and operating no trains in the State of Missouri, and doing no business in said state other than soliciting freight and passengers to be carried over its lines entirely outside of Missouri, and having no office or place of business in the State of Missouri, except offices in Kansas City and St. Louis in said state for the use of its freight and passenger solicitors; and when it is further made to appear that all of the witnesses by whom said defendant railroad company must establish its defense are its employes residing in the State of Colorado who must, at great expense to defendant be brought to Missouri and maintained there during the trial?

2. If it be found that such a suit against the Denver and Rio Grande Western Railroad Company, when brought in Missouri, is an undue and unreasonable burden on interstate commerce, can the action be maintained in said state by reason of the fact that plaintiff has joined as a codefendant The Atchison, Topeka and Santa Fe Railway Company (petitioner), an interstate railroad organized under the laws of the State of Kansas and operating, under a license, its railroad into and through the State of Missouri, when it is alleged by plaintiff that there is joint liability only because of some alleged operating contract existing between the two defendants, and when it is further made to appear that the Santa Fe Company must use

in its defense the same employes of the Denver and Rio Grande Western Railroad Company, and that they must likewise, in such defense, be brought from Colorado to Missouri for the trial; and when it also appears that the Santa Fe Company can be sued and served with process in the State of Colorado?

Reasons for Allowance of the Writ.

The decision of the Supreme Court of Missouri (without any written opinion having been filed) in effect decided that the Circuit Court of Jackson County, Missouri, at Kansas City, has jurisdiction of a suit brought against your petitioners—foreign railroad corporations—one of whom, the Denver and Rio Grande Western Railroad Company, has no tracks or property in Missouri, has not consented to be sued in said state and does no business in Missouri other than the solicitation of freight and passenger business, and the other of whom, The Atchison, Topeka and Santa Fe Railway Company, while not incorporated in the state, does business therein under a license or permit, upon an alleged cause of action which did not arise or accrue in the State of Missouri, but arose in a foreign state while the plaintiff was an employe of and engaged in the service of your petitioner, Denver and Rio Grande Western Railroad Company, in said foreign state where the plaintiff resided at the time of the injury complained of.

It is respectfully insisted that the decision of the Supreme Court of Missouri is not in accord with the decisions of this Honorable Court in *Michigan Central Railroad Co.* v. *Mix et al.*, 278 U. S. 492; *Davis* v.

Farmers Co-operative Equity Company, 262 U. S. 312, and in *Atchison, Topeka and Santa Fe Railway Company* v. *Wells*, 265 U. S. 101, all holding that the commerce clause of the Constitution prohibits the maintenance of such suits under the conditions specified. Furthermore, it is in conflict with the decisions of the Supreme Court of the United States in the cases of *Green* v. *C. B. & Q. Ry. Co.*, 205 U. S. 530; *Philadelphia & Reading Railway Co.* v. *McKibben*, 243 U. S. 264; *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, and other cases holding that to permit such suits being maintained under the circumstances specified would be violative of the Fourteenth Amendment to the Constitution of the United States.

Your petitioner, Denver and Rio Grande Western Railroad Company has had a number of suits filed against it in Missouri, which it has been called upon to defend at great expense, and in which it has been confronted with the claim that it can be sued in Missouri because of the presence in that state of said petitioner's agent, such claim being based upon the expressions of the Supreme Court of Missouri in the cases of *State ex rel. Sale*, 232 Mo. 167, and *Davis* v. *Jacksonville Southeastern Line*, 126 Mo. 69, in which the Supreme Court of Missouri held that service upon a soliciting freight agent is valid under the statutes of Missouri.

The record now before this Court is complete. Your petitioners respectfully urge that the case is one involving questions of law of importance to your petitioners and other railroads engaged in interstate

transportation and that the situation imperatively calls for clarification in the interest of the railroads in order that they may be relieved from the unnecessary and unreasonable burden imposed upon them and upon interstate commerce by the defense of such suits in jurisdictions foreign to and far distant from the place of accident.

Wherefore, your petitioners pray that a writ of certiorari issue to the Supreme Court of the State of Missouri commanding said Court to certify and send to this Court for its review and determination, on a day to be designated, a full and complete transcript of the record and all proceedings of said Supreme Court of the State of Missouri had in this cause, to the end that this cause may be reviewed and determined by this Court; that the judgment of the Supreme Court of Missouri be reversed, and that petitioners be granted such other and further relief as may seem proper. Dated, Kansas City, Missouri, May, 1931.

THOMAS HACKNEY,
Counsel for Petitioner, Denver and Rio Grande Western Railroad Company.

CYRUS CRANE,
Counsel for Petitioner, The Atchison, Topeka and Santa Fe Railway Company.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

No opinion filed.

Jurisdiction.

The final judgment of the Missouri Supreme Court now to be reviewed, was entered on March 3, 1931 (R. 88). The jurisdiction of this Court is invoked under Section 237b of the Judicial Code (U. S. Code, Title 28, S. 344, 43 Statutes, 937.)

The right of this Court to review by certiorari the questions herein presented, is clearly recognized by late cases decided by this Court:

Michigan Central R. R. Co. v. *Mix*, 278 U. S. 492.

Davis v. *Farmers Co-operative Equity Co.*, 262 U. S. 312.

STATEMENT.

The principal facts have already been set forth in the petition, *supra* pages 1 to 10. A summary of the argument appears in the index.

ARGUMENT.

(1) Jurisdiction Considered Under the Commerce Clause.

The essential facts in this suit are almost parallel with those considered by this Court in the case of *Michigan Central R. R. Co.* v. *Mix*, 278 U. S. 492. One difference lies in the fact that in the case at bar there

are two defendants, both foreign corporations, one of whom has been licensed to do and does business within the state, and the other of whom has not been licensed and does not do business in the state other than to solicit freight and passenger business to be done and performed entirely outside of the State of Missouri, which latter company is in the same situation as is the Michigan Central in the *Mix* case.

In the case at bar the plaintiff, Ray Curtis, was an employe of the Denver and Rio Grande Western Railroad Company, a Delaware corporation, and while engaged in the performance of his duties for that company in repairing its interlocking plant at Pueblo, Colorado, claims to have been injured, and said suit was brought to recover damages on account of said alleged injuries. At the time of the alleged accident and injury, Ray Curtis, the plaintiff, was living at Pueblo, Colorado, and resided there until July or August, 1930, when he moved to Trenton, Missouri, and shortly thereafter instituted his said suit against your petitioners in the Circuit Court of Jackson County, Missouri, so the circumstances of the citizenship of the plaintiff in the case here under consideration and the plaintiff in the *Mix* case are quite similar.

The *Mix* case was an action brought in the State of Missouri against the Michigan Central Railroad Company to recover damages for the death of a switchman employed by defendant in Michigan and killed while in the performance of his duties. He was then a resident of Lansing, Michigan. Shortly after his death his wife moved to Missouri, was appointed

administratrix of his estate at St. Louis, and as such brought her suit for damages. The defendant railroad was a Michigan corporation, with no part of its railroad in Missouri. It had never been licensed to do business in Missouri and had never done any business there except to solicit freight for transportation in interstate commerce in other states. For this limited purpose it maintained an office at St. Louis and upon the agent in charge of that office the sheriff made service of summons.

The Court held that the mere fact that plaintiff had acquired a residence in Missouri before commencing the action did not make reasonable the imposition on interstate commerce of the heavy burden which would be entailed in trying the case in a state remote from that in which the accident occurred.

The judgment of the Supreme Court of Missouri denying the application of the railroad company for a writ of prohibition from trying the action brought under the Federal Employers' Liability Act was reversed.

In the case of *Davis* v. *Farmers Co-operative Equity Corporation*, 262 U. S. 312, both the plaintiff and defendant were residents of Kansas, and suit was brought in a Minnesota state court, where service of process was attempted upon a freight solicitor. The cause of action arose in some state other than Minnesota. This Court decided that to permit such a suit to be maintained would constitute an unreasonable burden upon interstate commerce, and that the Minnesota statute which attempted, under such circumstances, to

vest jurisdiction in its state court, was violative of the commerce clause of the Constitution of the United States, and, therefore, void. In so holding this Court said:

> "But orderly, effective administration of justice clearly does not require that a foreign carrier shall submit to suit in a state in which the cause of action did not arise in which the transaction giving rise to it was not entered upon, in which the carrier neither owns nor operates a railroad, and in which the plaintiff does not reside. The public and carriers are alike interested in maintaining adequate, uninterrupted transportation service at reasonable cost. This common interest is emphasized by Transportation Act 1920, which authorizes rate increases necessary to insure to carriers, efficiently operated, a fair return on property devoted to the public use. * * * Avoidance of waste in interstate transportation, as well as maintenance of service, have become a direct concern of the public. With these ends the Minnesota statute, as here applied, unduly interferes. By requiring from interstate carriers general submission to suit, it unreasonably obstructs and unduly burdens interstate commerce."

The considerations which prompted the Court to the conclusions which it expressed were pointed out to the Supreme Court of Missouri in this case. In the petition it was shown (R. 38, 39) that all of the witnesses who might be required in the defense of the Curtis case in the Circuit Court of Jackson County, Missouri, resided in Colorado where the cause of action accrued; that the railroads' witnesses were employed by the Denver and Rio Grande Western Railroad Company, in Colorado in the operation of its railroad; that

these witnesses would have to be brought to Kansas City at great expense, and that the employment of others to assist in the operation of the railroad would entail an additional expense.

In the case of *Atchison, Topeka and Santa Fe Ry. Co.* v. *Wells,* 265 U. S. 101, a suit for personal injuries was brought in Texas by a citizen of Colorado against the Santa Fe, which is a Kansas corporation. In deciding that the judgment obtained against the Santa Fe in Texas was void, this Court said:

> For the reasons stated in *Davis* v. *Farmers Co-operative Corp.,* 262 U. S. 312 (decided since the entry of the judgment here under review), such a suit necessarily and unreasonably burdens interstate commerce and the statute as construed and applied is invalid.

The burden upon interstate commerce is present in the case at bar, just as it was in the *Mix,* the *Davis* and the *Wells* cases. The plaintiff, apparently, has removed to Missouri, but he did so after the cause of action had accrued. At the time of the alleged accident he had resided for a considerable period at Pueblo, Colorado, where all of the witnesses resided—his as well as the railroads'—and where he could have tried his case at a minimum of expense to himself and to the railroad companies.

In *State ex rel.* v. *Taylor,* 266 U. S. 200, this Court had occasion again to consider the application of the principles announced in the *Davis* and *Wells* cases. It was held in that case that the facts presented did not bring it within the ruling in the Davis and Wells

cases, and in consequence the jurisdiction of the state court was sustained. There the plaintiff, although a Delaware corporation, maintained a usual place of business in Missouri. The defendant was a Texas railroad company which did not enter Missouri, maintained no offices in Missouri and had not consented to be sued in Missouri. The suit was one of attachment for damages to freight originating in Texas and destined (some of it) to Missouri. Under these circumstances this Court held that the state court had jurisdiction. The distinctions between that case and the case at bar are to be noted as follows:

First. That was a proceeding *in rem* in which no personal judgment was sought, nor could such be entered. As to such proceedings *in rem* different rules of law are applicable (*Pennoyer* v. *Neff*, 95 U. S. 714).

Second. The plaintiff was, in a practical sense, a resident of Missouri.

Third. The negligence, for aught that appears, occurred in Missouri.

Fourth. The shipment was destined to Missouri.

Fifth. There was only one defendant in that case.

These differentiating elements were all absent in the present case at the time the cause of action accrued, and this case is, therefore, to be determined by what was said in the Mix, the Davis and the Wells cases.

(2) Jurisdiction Considered Under the Fourteenth Amendment.

In *Davis* v. *Farmers Co-op. Equity Corp., supra,* this Court having decided that the commerce clause of the Constitution deprived the state court of Minnesota of jurisdiction over the suit there pending, thought it unnecessary to decide whether such jurisdiction was also repugnant to the Fourteenth Amendment, but in so expressing itself felt constrained to refer to cases in which it had been decided that in similar situations the Fourteenth Amendment forbade jurisdiction in state and federal courts.

In *Green* v. *C. B. & Q.,* 205 U. S. 530, the suit was brought in the United States Circuit Court in Pennsylvania, by a citizen of Pennsylvania, to recover damages for personal injuries sustained in Colorado through negligence of the Chicago, Burlington and Quincy Railroad Company, whose lines of railroad did not extend into Pennsylvania and whose only business in Pennsylvania was that of soliciting freight through a freight solicitor. This Court held that the solicitation of freight was not sufficient to bring the defendant railroad company within the jurisdiction of the federal court in that state. No reference was made in the opinion to the due-process clause of the Constitution.

The ruling in the *Green* case was followed in the case of *P. & R. Ry. Co.* v. *McKibben,* 243 U. S. 264, in which the Court prefaced a consideration of the facts and laws by saying:

> "A foreign corporation is amenable to process to enforce a personal liability in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there."

In that case the plaintiff, a citizen of New York, brought suit in the District Court of the United States for the Southern District of New York against the railroad, a Pennsylvania corporation, for a personal injury sustained in New Jersey.

In *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79, being a suit commenced in a United States District Court, this Court, in considering whether the transaction of certain business was sufficient to subject a corporation to suit in a foreign jurisdiction, said:

> The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction and is by its duly authorized officers or agents present within the state or district where service is attempted.

And, again:

> As to the continued practice of advertising its wares in Louisiana and sending its soliciting agents into that state, as above detailed, the agents having no authority beyond solicitation, we think the previous decisions of this Court have settled the law to be that such practice did not amount to their doing that business which subjects the corporation to the local jurisdiction for the purpose of service of process upon it.

In the case of *Rosenberg Bros. & Co.* v. *Curtis Brown Co.*, 260 U. S. 516, the suit was brought in a New York state court and removed to a federal court. The plaintiff was a New York corporation. The defendant was an Oklahoma corporation. This Court affirmed the decision of the District Court, holding that the suit could not be maintained.

In *Chipman* v. *Jeffries Co.*, 251 U. S. 373, the suit was begun in a state court of New York and removed to the federal court. The plaintiff was a New York corporation. The defendant was a Wisconsin corporation. The cause of action apparently arose in New York where the suit was brought. Upon consideration of the statute of New York under which service had been obtained this Court reached the conclusion that under the decisions of the highest appellate court of New York jurisdiction could not be maintained, but in so disposing of the case this Court said:

> In resting the case on New York decisions, we do not wish to be understood that the validity of such service as here involved would not be of federal cognizance, whatever the decision of the State Court, and refer to *Pennoyer* v. *Neff*, 95 U. S. 714; *St. Louis S. W. Rwy. Co.* v. *Alexander, supra; Philadelphia & Reading Rwy. Co.* v. *McKibbin*, 243 U. S. 264; *Meisukas* v. *Greenough, Red Ash Coal Co.*, 244 U. S. 54; *Peoples Tobacco Co.* v. *American Tobacco Co.*, 246 U. S. 79.

From the foregoing decisions it will appear that the rule excluding jurisdiction in cases where it is attempted to subject the defendant to a foreign jurisdiction because of the transaction of business done by drummers or soliciting freight agents, is applied in

cases originating in the state courts as well as those originating in the federal courts. These cases, and what is said in the opinions, exclude the thought that this Court was deciding the simple question of service of process. The citation of Pennoyer vs. Neff, in the Chipman case, *supra*, gives point to the language of this Court in the cases above referred to. In Pennoyer vs. Neff, the Court was dealing with the fundamental question of what would and what would not be due process under the Constitution of the United States. This Court has in the cases referred to emphasized the fundamental proposition that a corporation cannot, in the absence of its consent, be compelled to defend a suit *in personan* (as distinguished from a suit *in rem*) in a jurisdiction where it does not transact business of a kind or to a degree which can be taken as a submission to that jurisdiction by the transaction of business therein. That in so deciding this Court had in mind the due-process clause of the Constitution is further shown by what is said in *Simon* v. *Southern Ry.*, 236 U. S. 115, to which we refer without burdening the Court with a review of the questions discussed and decided.

Conclusion.

We respectfully submit that the decision of th Supreme Court of Missouri is in conflict with and contrary to the decisions of this Honorable Court and for that reason a writ of certiorari should issue in order that the rulings on questions arising under the Employers' Liability Act may be uniform. The very uncertainty of the Appellate Court of Missouri

as to the law of this case, indicated by the dissent of two of the justices of that Court, is a cogent reason why it should be reviewed here by certiorari. Inasmuch as the decision of the Supreme Court of Missouri is in direct conflict with decisions of this Honorable Court the subject is one which demands the clarification which can only come from a decision of this Court.

It is therefore respectfully submitted that a writ of certiorari should issue as prayed.

Respectfully submitted,

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Counsel for Petitioner, The Atchison, Topeka and Santa Fe Railway Company.